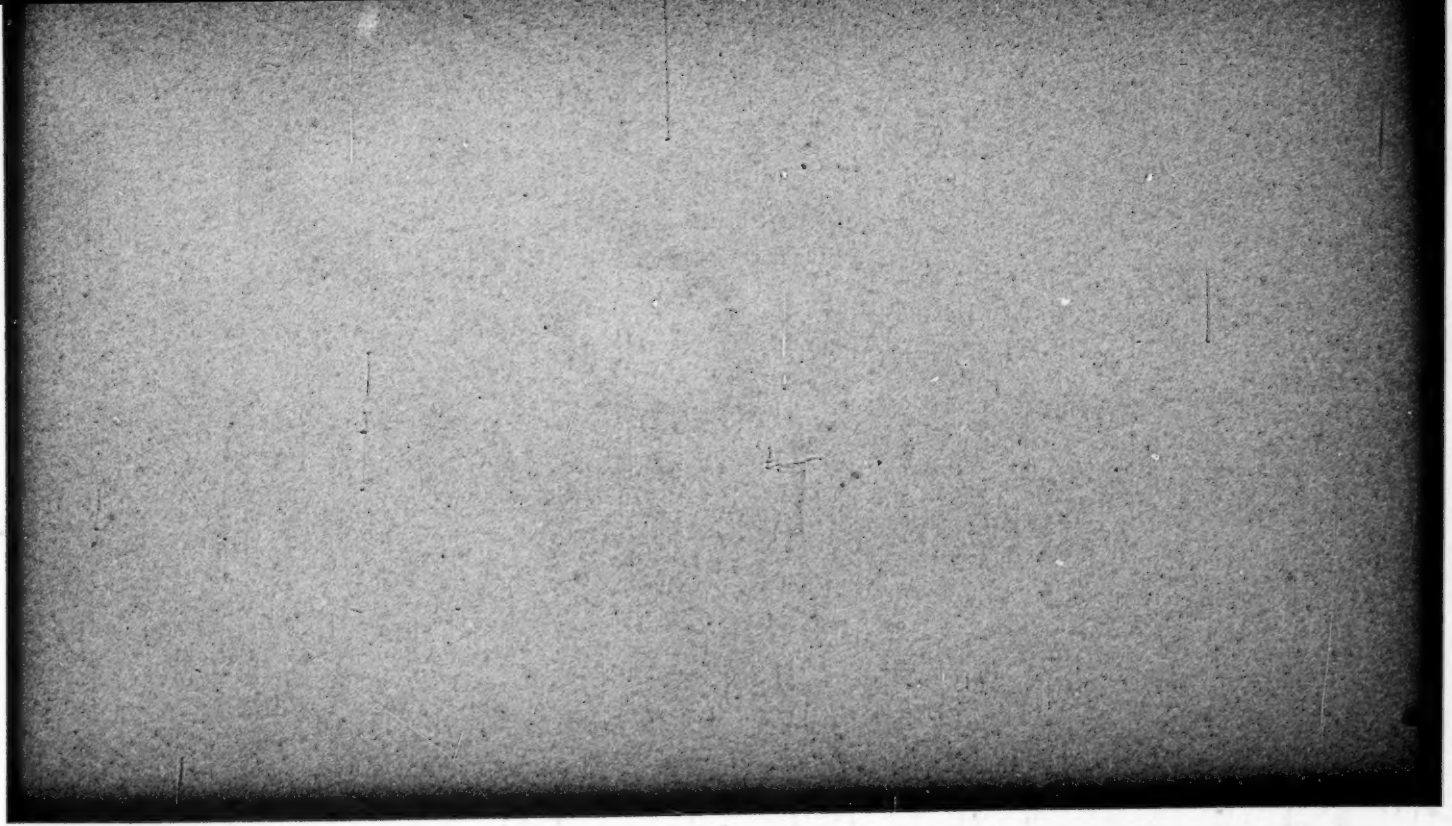

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MICHAEL RODAK,

IN THE

# Supreme Court of the United States

**October Term, 1973.**

**No. 73-1908**

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,

*Petitioners,*

*v.*

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

EDWIN P. ROME,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,
Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103

CURTIS H. BARNETTE,
Martin Tower 2007,
Bethlehem, Pennsylvania.

*Attorneys for Petitioners.*

*Of Counsel:*
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103

International Printing Co., 711 Sc. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

No. .

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

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BETHLEHEM STEEL CORPORATION,

*Petitioners,*

*v.*

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, Ivor D. Sims, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs, George P. Jenkins and Bethlehem Steel Corporation pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on April 16, 1974.

## OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment for Petitioners on July 11, 1973, without opinion. The Order of the District Court granting summary judgment is printed as Appendix E hereto, *infra,* p. A30. The majority opinion of the panel of the Court of Appeals for the Third Circuit, reversing the Order of the District Court, and the dissenting opinion in the Court of Appeals, both dated April 16, 1974, are as yet unreported and are printed as Appendix D hereto, *infra,* pp. A6-A29. The Court of Appeals denied a Petition for Rehearing and Suggestion of Rehearing En Banc, without opinion. The Order denying the Petition for Rehearing is printed as Appendix B hereto, *infra,* pp. A2-A3.

## JURISDICTION.

The Court of Appeals entered judgment reversing the District Court (Appendix C, pp. A4-A5) on April 16, 1974. A timely petition for rehearing containing a suggestion for rehearing *en banc* was filed by the Petitioners on April 30, 1974, and was denied by Order (Appendix B, pp. A2-A3) of the Court of Appeals *en banc* dated and entered May 15, 1974. On May 17, 1974, Petitioners filed a motion for stay of mandate pending application to this Court for a Writ of Certiorari, which the Court of Appeals granted by Order (Appendix A, p. A1) dated May 22, 1974, thereby staying its mandate until June 21, 1974.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

Title 18 U. S. C. § 610, a criminal provision recently reenacted and amended in Title II of the Federal Election Campaign Act of 1971 ("FECA"), prohibits corporations and labor unions from making contributions and expenditures "in connection with" any federal election, and provides that an officer or director of any corporation, or officer of any labor organization, who consents to any such contribution or expenditure is punishable by a fine of $1,000 or imprisonment for one year, or both.

The constitutionality of this provision has twice been questioned by this Court, in *United States v. C. I. O.*, 335 U. S. 106 (1948), where four Justices concurred in the unanimous dismissal of an indictment under § 610, on the ground that § 610 is unconstitutional, and in *United States v. International Union United Auto Workers*, 352 U. S. 567 (1957), where three dissenting Justices expressed the view that this Court should reach the constitutional questions presented and declare § 610 unconstitutional, describing § 610 as "a broadside assault on the freedom of political expression guaranteed by the First Amendment", 352 U. S. at 598 (dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black and Mr. Chief Justice Warren). The constitutionality of § 610 was expressly pretermitted in *Pipefitters v. United States*, 407 U. S. 385, 400 (1972).

The questions presented are these:

1. Did the Court of Appeals err in "implying" from 18 U. S. C. § 610 a private right of action, not otherwise authorized by statute, on behalf of a stockholder and registered voter against the directors of a corporation for a corporate expenditure for advertising allegedly in violation of § 610

(i) in spite of the grave doubt concerning the constitutionality of § 610, which the Court of Appeals expressly refused to resolve, while at the same time "implying" a private right of action from the statute,

(ii) in the absence of any manifestation in the language of § 610 itself of any Congressional intent to authorize such a private right of action,

(iii) in the conceded absence of any legislative history evidencing Congressional intent to permit such a private right of action,

(iv) in the absence of any jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), conferring federal jurisdiction over the subject matter, and

(v) in view of the clear inference of *contrary* Congressional intent not to provide such a private remedy, to be drawn from Congress' provision of a private remedy in Title III of the Federal Election Campaign Act of 1971 and the conspicuous absence of such a remedy from Title II of the Act, which contains § 610?

2. Is the decision of the Court of Appeals, "implying" such a supplemental, private right of action from the criminal provisions of 18 U. S. C. § 610 consistent with standards articulated in *National Railroad Passengers Corp. v. National Association of Railroad Passengers*, — U. S. —, 42 U. S. L. W. 4132 (Opinion filed January 9, 1974) and *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959)?

3. In view of the doubtful constitutionality of 18 U. S. C. § 610, did the Court of Appeals depart from

settled principles of statutory construction by *expanding* the coverage of the statute to subsume additional remedies not authorized by Congress, instead of *restricting* the scope of remedies for its violation to those expressly provided, and thereby avoiding the question of its constitutionality?

4. In view of the doubtful constitutionality of 18 U. S. C. § 610 and the rule of construction that where language of an act will bear two interpretations equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred, did the Court of Appeals err in construing the term "expenditure", as used in 18 U. S. C. § 610, in such a way as to include within the statutory prohibition an expenditure for advertising, which is not in the nature of active electioneering and only incidentally expresses a view upon important public issues, and does not so much as mention the name of any political party or candidate for election to federal office?

5. On its face and as construed and applied by the Court of Appeals, is 18 U. S. C. § 610 violative of the freedoms of speech, press, petition and association, guaranteed by the First Amendment of the Constitution of the United States?

6. On its face and as construed and applied by the Court of Appeals, does § 610's prohibition, directed only against contributions and expenditures by labor unions and corporations, deprive labor unions and corporations of the equal protection of the laws, guaranteed by the Fifth Amendment of the Constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First and Fifth Amendments of the Constitution of the United States and 18 U. S. C. § 610, as amended by Sections 201 and 205 of the Federal Election Campaign Act of 1971, P. L. 92-255, 86 Stat. 3, are set out in Appendix G, *infra*, pp. A43-A49.

## STATEMENT OF THE CASE.

### 1. The Background.

An advertisement (the "Advertisement") entitled "I say, let's keep the campaign honest. Mobilize 'truth squads' . . ." appeared from on or about August 22, 1972, until September 7, 1972, in various magazines and in nineteen local newspapers in towns in which Bethlehem Steel Corporation ("Bethlehem") has plants. In connection with the September 11, 1972 mailing of a quarterly dividend to its stockholders, Bethlehem sent its stockholders a reprint of the Advertisement.

The Advertisement was based on a speech (the "Speech") given by Stewart S. Cort, Chairman of Bethlehem. As indicated in the Advertisement, the Public Affairs Department of Bethlehem sent to readers, on request, copies of the Speech and copies of a folder (the "Folder") entitled "How you can help to keep the campaign honest".

The Advertisement, the Speech and the Folder[1] encourage readers to become concerned and informed citizens, by reading books, magazines, newspapers and reports, by identifying the major issues of the day, by watching televised news programs, by listening to the views of political candidates, and by discussing current affairs and issues with friends, neighbors and business associates. Typical of the statements contained in these publications is the following excerpt from the Advertisement:

> "Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to en-

1. Reproduced as Appendices H, I and J hereto, respectively.

courage responsible, honest, and truthful campaigning. Mobilize 'truth squads', perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

The Advertisement incidentally refutes the accusation of an unnamed "political candidate" that "big business" does not pay its fair share of taxes, by quoting the following statement of Stewart S. Cort, the Chairman of Bethlehem:

"My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

Neither the Advertisement nor the Speech nor the Folder mentions the name of any political party or of any candidate for election to any federal office.

**2. The Complaint.**

This stockholder's action was filed against Bethlehem and its directors in the United States District Court for the Eastern District of Pennsylvania on September 28, 1972, on the eve of the 1972 Presidential election, by Richard A. Ash, Esquire ("Ash"), the owner of 50 shares of common stock of Bethlehem. The original complaint, to which is attached a copy of the Advertisement, alleged that the directors of Bethlehem had authorized an expenditure for the Advertisement and charged that such expenditure was in violation of 18 U. S. C. § 610, as amended by the FECA, P. L. 92-225, 86 Stat. 3. Count II of the original complaint charged that the expenditure was *ultra vires* and illegal under Delaware law. The complaint sought injunctive relief, including an Order that defendants place "corrective advertising at their own expense in national media", compensatory and punitive damages in favor of Bethlehem, together with costs and attorneys' fees. Federal jurisdiction in the District Court was invoked pursuant to 28 U. S. C. § 1331.

**3. Application for Injunctive Relief in the District Court.**

The District Court denied Ash's application for a temporary restraining order on October 13, 1972. Plaintiff's motion for a preliminary injunction was denied on October 25, 1972, after a hearing at which the parties entered into a stipulation (the "Stipulation") of uncontested facts in lieu of testimony. The Opinion of the District Court denying plaintiff's motion for a preliminary injunction is reported at 350 F. Supp. 227 (E. D. Pa. 1972) and is printed as Appendix F. The reasons for denial of the preliminary injunction are there summarized as follows (350 F. Supp. at 232):

"Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

"(a) plaintiff had no private right of action under 18 U. S. C. § 610;

"(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not 'contributions or expenditures' within the meaning of 18 U. S. C. § 610;

"(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not 'expenditures' made for 'the purpose of influencing the nomination for election, or the election of any person to Federal office' and hence, are not 'expenditures' within the meaning of 18 U. S. C. § 591 (f)(1);

"(d) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder did not constitute 'active electioneering directed at the general public on behalf of a candidate in a Federal election' as defined in the legislative history to the recent amendment of 18 U. S. C. § 610; Congressional Record, November 30, 1971, H 11477, 11478;

"(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder would prevent a corporation from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;

"(f) under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid

an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of crucial concern to it and to the public, thus preventing a public debate on such issues."

**4. Appeal of District Court's Denial of Injunctive Relief.**

Ash appealed to the Court of Appeals for the Third Circuit which, after oral argument, affirmed, *per curiam*, the order of the District Court denying his motion for a preliminary injunction. *Ash v. Cort*, 471 F. 2d 811 (3d Cir. 1973). Ash's Petition for Rehearing was denied by the Court of Appeals on January 31, 1973.

**5. The District Court's Grant of Summary Judgment for Petitioners.**

Petitioners moved in the District Court to require the posting of a bond for security for expenses, and on March 7, 1973, the District Court entered an Order granting the motion for security for expenses with regard to the cause of action under Delaware law, alone, directing Ash to post a bond within ten days in the amount of $35,000 as security for expenses. At the same time, the District Court granted Ash leave to amend the complaint by eliminating the claim under Delaware law set forth in Count II of the complaint, which Ash did on March 19, 1973.

Petitioners thereafter moved for summary judgment on the federal claim in Count I based on 18 U. S. C. § 610, on the grounds (1) that a stockholder has no private right of action for alleged violations of § 610, (2) that § 610 is inapplicable as a matter of law to the stipulated facts of the case, and (3) that § 610 is unconstitutional.

On July 11, 1973, the District Court entered an Order granting Petitioners' motion for summary judgment.

Ash appealed from the District Court's Order of July 11, 1973, granting Petitioners' motion for summary judgment.

**6. Appeal of Judgment for Petitioners.**

A panel of the Court of Appeals on April 16, 1974, reversed the judgment of the District Court in an Opinion written by Chief Judge Seitz for the majority. In a scholarly Opinion, Judge Aldisert dissented, stating that the holding of the majority, "implying" a private right of action, can be arrived at "only by defying the Supreme Court's recent decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, — U. S. — (42 U. S. L. W. 4132, January 9, 1974 (*Amtrak*)."

Noting the conspicuous absence in Title II of the FECA of any civil remedy, public or private, in contrast with the supplemental civil remedy expressly provided by Congress in Title III of the FECA, Judge Aldisert stated (*infra*, p. A29):

> "I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: 'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.' A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar 'principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*' "

The dissent points out (*infra*, p. A26) that there is "no language in the Act manifesting Congressional intent to create a private right of action by implication" and (*infra*, p. A27) that "appellant conceded at oral argu-

ment that the Congressional history is devoid of any reference to a private civil remedy".

The majority of the panel concluded that there exists an "implied" private, civil right of action for violation of § 610, in addition to the criminal sanction, (i) in the absence of any manifestation of intent in the language of the Act and the absence of any legislative history evidencing Congressional intent to imply authorization for such a private right of action, and (ii) in spite of the grave doubts concerning the constitutionality of § 610 expressed in the opinions of this Court in *United States v. C. I. O., supra,* and *United States v. International Union United Auto Workers, supra,* and (iii) in the face of the clear inference of Congressional intent not to create a private right of action, to be drawn from the conspicuous absence of a private remedy in Title II, as contrasted with Title III, of the Act.

Petitioners filed a petition for rehearing and suggestion of rehearing *en banc,* which was denied by the Court of Appeals without opinion on May 15, 1974. Petitioners filed a motion for stay of mandate pending application to this Court for a Writ of Certiorari, which stay the Court of Appeals, by order dated May 22, 1974, granted until June 21, 1974.

Petitioners hereby state, pursuant to Rule 33(2)(b) of this Court, that the provisions of 28 U. S. C. § 2403 may be applicable and that no Court below has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn in question in these proceedings.

## REASONS FOR GRANTING THE WRIT.

### I. The Court Below Ignored Controlling Decisions of This Court on the Criteria Governing the Implication of Private Remedies From Federal Penal and Regulatory Statutes Not Expressly Providing for Such Remedies.

The Federal Election Campaign Act of 1971, 86 Stat. 3, which embodies 18 U. S. C. § 610, is a comprehensive statutory scheme which creates a complex and detailed administrative procedure for monitoring and regulating federal election campaigns. The Act delegates to various election supervisory officers and to the Department of Justice the responsibility for implementing and enforcing its specific provisions regarding limitations on campaign expenditures, registration and reporting requirements for political committees and disclosure of federal campaign funds. Pursuant to the authority conferred by the Act, a comprehensive set of regulations has been promulgated, implementing in greater detail the requirements of the Act. 11 C. F. R. §§ 1-21.1 and Supplements A and B thereto.

Title II of the Act sets forth amendments to criminal statutes contained in Title 18 of the United States Code relating to federal elections, including 18 U. S. C. § 610.

Title III of the Act expressly provides a civil remedy in addition to the criminal sanctions contained in Title III. Section 308(d)(1)-(5) of Title III, 2 U. S. C. § 438(d)(1)-(5), expressly provides the exclusive method of private enforcement of the provisions of Title III of the Act, by providing that "any person who believes a violation of [Title III] has occurred may file a complaint with the supervisory officer." Upon complaint, the supervisory officer investigates and if, in the judgment of the supervisory officer, any person has engaged in or is about to engage in

any acts or practices in violation of any provision of Title III, the statute directs that the Attorney General "*shall* institute a civil action for relief" including injunctive relief.[2]

The civil remedy thus provided supplements the penal provision of that Title, section 311, 2 U. S. C. § 441. See also 11 C. F. R. §§ 20.10 and 20.11.

In dramatic contrast with Title III of the Act, Title II, which includes 18 U. S. C. § 610, contains no such authorization for a civil remedy to supplement the criminal sanctions expressly provided in Title II.

By the well established principle of *expressio unius est exclusio alterius*, it follows that where Congress expressly provides a particular way of redressing violations of a Congressional enactment, other methods are not to be implied. The Court of Appeals erred, therefore, in "implying" a private civil remedy supplementing the criminal sanction expressly provided. In so holding, the majority of the Court below ignored *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, — U. S. —, 42 U. S. L. W. 4132 (Opinion filed January 9, 1974) (the "Amtrak" case); *Calhoon v. Harvey*, 379 U. S. 134 (1964); and *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959), each of which held that where Congress has expressly provided a particular type of civil remedy in one title of an act, but not in a second title of the act, the inference to be drawn is that Congress did not intend to create a civil remedy in the title in which it did not expressly provide one.

The Court below concluded that Ash, as a stockholder and voter, was within the class of beneficiaries of the Act, and therefore that implication of a supplemental civil right of action was appropriate, citing *J. I. Case Co. v. Borak*,

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2. Emphasis supplied throughout, unless otherwise stated.

377 U. S. 426 (1964). However, this basis was rejected in the *Amtrak* case, where this Court said:

> "It goes without saying, however, that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.
>
> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act." 42 U. S. L. W. at 4134.

The principle has long been recognized by this Court. *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 720 (1967); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1951); *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301 (1943).

While any rule of statutory construction can undoubtedly be overridden in particular circumstances, such rules play a necessary role in construing statutes and should not

be disregarded unless there is definite indication of contrary legislative intent.

There is no such indication of contrary legislative intent in this case. The majority below points to no feature of the language or structure of the Act itself in support of its conclusion. It was, moreover, conceded in the Court below by Respondent that there is no manifestation in the legislative history of any legislative intent to provide a private right of action for violations of § 610.

In the conceded absence of any such Congressional intent, the decision of the Court below to "imply" a private cause of action is an act of pure judicial legislation the reversal of which is required by the application of the *Amtrak* principle.

**II. In View of the Doubtful Constitutionality of § 610, the Court Below Erred in Expanding the Scope of Remedies Under the Statute Beyond Those Expressly Provided.**

This Court has twice questioned the constitutionality of § 610 in cases presenting the issue of the legality of expenditures for advertising. *United States v. C. I. O.*, 335 U. S. 106 (1948); *United States v. International Union United Auto Workers*, 352 U. S. 567 (1957). In a recent case involving the "contribution" aspect of the statute's prohibition, the constitutionality of § 610 was expressly pretermitted. *Pipefitters v. United States*, 407 U. S. 385, 400 (1972). The constitutional infirmities of § 610 are underscored in the concurring opinion of Mr. Justice Rutledge in *United States v. C. I. O., supra*, and in the dissenting opinion of Mr. Justice Douglas in *United States v. International Union United Auto Workers, supra.*

The question of implication of an additional, private remedy, not expressly authorized by statute, for alleged

violation of § 610 necessarily draws into play "the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred." *United States v. C. I. O., supra,* 335 U. S. at 120-121; *Knights Templars' & Masons' Life Indemnity Co. v. Jarman,* 187 U. S. 197, 205 (1902). Consideration of this principle compels the conclusion that § 610 should be narrowly construed to avoid the constitutional issues lurking in the vague and overbroad language of this statute restricting fundamental constitutional freedoms. As this Court said of § 610 in *United States v. C. I. O., supra,* 335 U. S. at 120-121:

> "From what we have previously noted, it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgement of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality."

The decision of the Court of Appeals in this case violates this fundamental axiom of statutory construction and ignores the obligation it entails. Instead, the Court of Appeals has adopted a construction of § 610 which expands its coverage to subsume *additional* remedies not authorized by statute. In reversing the District Court, over a vigorous dissent, the Court below has rejected a construction of § 610 which would restrict the scope of remedies for violation of

§ 610 to those expressly provided by Congress and thereby avoid the necessity of a decision on the constitutionality of this important legislation governing the conduct of federal election campaigns.

The decision of the Court below places § 610 on a collision course with the First and Fifth Amendments, and the consequences of that decision can only be averted by review in this Court.

**III. This Court Should Settle a Critical Question of Statutory Construction Involved in the Administration and Enforcement of the Federal Election Campaign Act of 1971, on Which the Circuits Are Split.**

The Court below concluded that § 610 might be applicable to the Advertisement involved in the present case even though the Advertisement does not so much as mention the name of any political party or the name of any candidate for election to federal office.

In adopting this construction, the Court of Appeals again violated fundamental principles of statutory construction by selecting the very construction, among equally obvious alternatives, which gives rise to grave questions concerning the constitutionality of § 610 and by ignoring the basic axiom that criminal provisions are to be strictly construed. Making expenditures for political speech a crime is a constitutionally dangerous enterprise. The decision below has given such a sweeping connotation to the term "expenditure" in § 610 that the demarcation between criminal speech and legal speech is now impossibly beclouded, thereby aggravating the constitutional infirmities of the "expenditure" provision of § 610.

The construction of § 610 by the Court of Appeals for the Third Circuit in this case places it in direct conflict with the Second and Ninth Circuits on the proper scope of the term "expenditure", as used in § 610 and the FECA.

In remanding *United States v. International Union United Auto Workers, supra,* for trial, instead of passing on the constitutional issues presented, this Court stated that one of the central questions bearing on the ultimate decision on the constitutionality of § 610 as applied to the advertising in that case was "Did [the advertising] constitute *active electioneering* or simply state the record of particular candidates on economic issues?" 352 U. S. at 592. From this passage of the Court's opinion, the lower courts have developed, in a line of decisions without exception until the decision in the present case, a test for determining the legality of expenditures for advertising under § 610. Under this unbroken series of precedents construing § 610, only advertising in the nature of "active electioneering" is deemed illegal under § 610. *United States v. Lewis Food Co.,* 366 F. 2d 710 (9th Cir. 1966), *reversing,* 236 F. Supp. 849 (C. Div. S. D. Cal. 1964), *on remand from* 381 U. S. 908 (1965); *United States v. Anchorage Central Labor Council,* 193 F. Supp. 504, 507 (D. Alaska 1961); cf. *United States v. National Committee for Impeachment,* 469 F. 2d 1135 (2d Cir. 1972). In *United States v. National Committee for Impeachment, supra,* the Government sought injunctive relief against the defendants who had placed a two-page advertisement in the "New York Times" entitled "A Resolution To Impeach Richard M. Nixon as President of the United States." The advertisement printed the names of Congressmen who had endorsed the proposed resolution as an "Honor Roll", and in the following language solicited funds to be used for political purposes:

> "The National Committee For Impeachment will devote its resources in funds and publicity in aid of any new candidate for election to the House of Representatives or re-election of an incumbent Member, whether in a primary contest or the actual election contest,

whether Republican, Democrat, Independent, or a new party, in the order in which their names are officially printed in the Congressional Record. * * *"

The Court of Appeals for the Second Circuit rejected the Government's contention that the expenditure for the advertisement qualified as an "expenditure" under § 301 of the FECA and made the advertisers a "political committee" within the meaning of § 301, thus subjecting them to the reporting requirements of Title III of the Act. It was held that the definition of "expenditure" in Section 301 of the FECA, which closely parallels the definition of that term in Section 201 of the Act, 18 U. S. C. § 591(f)(1), and used in 18 U. S. C. § 610, does not encompass expenditures for advertising which derogates the stand taken by a particular candidate on any question.[3]

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3. The Court of Appeals for the Second Circuit outlined what it saw as the "abhorrent" consequences of the contrary view, adopted now by the Court of Appeals for the Third Circuit:

"We dispose more readily of the Government's suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—'With respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon's stand on a principal campaign issue—the Vietnam war.' On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributions, or the like. On the Government's thesis every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizen' rights' would fall under the Act. The dampening effect on first amend-

In *United States v. Lewis Food Company*, 236 F. Supp. 849 (S. D. Cal. 1964), the District Court dismissed an indictment under § 610 which charged that the defendant corporation had made expenditures totalling $9,523.68 to publish an advertisement entitled "Important Notice to Voters" in at least fourteen newspapers. The advertisement in question listed by name 2 United States Senators, 30 members of the House of Representatives, 40 California State Senators, and 80 California State Assemblymen, stating each legislator's political party affiliation. Opposite each legislator's name appeared a "rating" expressed as a percentage, which the text of the advertisement explained showed "the percentage of his votes cast in favor of constitutional principles." The advertisement stated that "100% is perfect." Twenty-eight legislators identified as Democrats received scores of 0. No legislator identified as a Republican received a score of 0.

It was held that the indictment did not state an offense under § 610 because the advertisement did not constitute "active electioneering." 236 F. Supp. at 853.

This Court remanded the Government's appeal of the dismissal to the Court of Appeals for the Ninth Circuit, 381 U. S. 908 (1965). Although the Court of Appeals reversed, *United States v. Lewis Food Company*, 366 F. 2d 710 (9th Cir. 1966), the Government conceded, and the Court of Appeals held, that an expenditure for advertising does not fall within the purview of § 610 unless the advertisement is in the nature of "active electioneering." 366 F. 2d at 712.

The decision of the Court of Appeals for the Third Circuit in the present case, holding that even an expendi-

3. (Cont'd.)
ment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable." 469 F. 2d at 1142 (footnote omitted).

ture for advertising which makes no mention of a political party or of a candidate for federal election may fall within the wide dragnet of § 610, squarely conflicts with the narrow construction adopted by the Second and Ninth Circuits and with the "active electioneering" test.

This Court should grant certiorari to resolve the conflict among the circuits regarding this important question of statutory construction, central to the nationwide administration and enforcement of the federal election laws. Doubt should not be permitted to remain as to the scope of § 610's prohibition of political speech. The present uncertainty of the law on this frontier of constitutional law has a chilling effect on the exercise of constitutionally protected activities which this Court should remove.

## IV. The Questions Involved Are of Exceptional Importance.

Because of the decision of the Court of Appeals, implying a private right of action from § 610, this case again presents the important issues concerning the construction and constitutionality of a vital component of the federal election laws which were before this Court in *United States v. C. I. O., supra,* and *United States v. International Union United Auto Workers, supra.* What rides in the balance of this case is no less than the depth of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times Co. v. Sullivan,* 376 U. S. at 270-271 (1964). The issues involve not only the right of expression, but the right of citizens to have access to the views of every group in the community. What Mr. Justice Douglas said in *United States v. International Union United Auto Workers, supra,* 352 U. S. at 593, remains true today:

"We deal here with a problem that is fundamental to the electoral process and to the operation of our democratic society. It is whether a union can express its views on the issues of an election and on the merits of the candidates, unrestrained and unfettered by the Congress. The principle at stake is not peculiar to unions. It is applicable as well to associations of manufacturers, retail and wholesale trade groups, consumers' leagues, farmers unions, religious groups and every other association representing a segment of American life and taking an active part in our political campaigns and discussions. It is as important an issue as has come before the Court, for its reaches the very vitals of our system of government."

**V. Conclusion.**

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

EDWIN P. ROME,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,
Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103

CURTIS H. BARNETTE,
Martin Tower 2007,
Bethlehem, Pennsylvania,
*Attorneys for Petitioners.*

*Of Counsel:*
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pennsylvania, 19103

## APPENDIX A.

**Order of the Court of Appeals Granting Appellees' Motion for Stay Pending Application for a Writ of Certiorari.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ETC.,

*v.*

STEWART S. CORT., ET AL.

RICHARD A. ASH, *Appellant.*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 21, 1974.

/s/ COLLINS J. SEITZ,
*Chief Judge.*

Dated: May 22, 1974

## APPENDIX B.

**Order of the Court of Appeals En Banc Denying Appellees' Petition for Rehearing.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,

*v.*

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, ET AL.,
*Appellees,*

and

BETHLEHEM STEEL CORPORATION,
*Nominal Defendant,*

RICHARD A. ASH,
*Appellant.*

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by APPELLEES in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ COLLINS J. SEITZ,
*Judge.*

Dated: May 15, 1974

## APPENDIX C.

### Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RE: RICHARD A. ASH

PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF,
AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

*v.*

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION
AND
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
*Nominal Defendant,*

RICHARD A. ASH,
*Appellant.*

(D. C. CIVIL No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and HASTIE and ALDISERT, *Circuit Judges.*

## JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed July 11, 1973, be, and the same is hereby reversed and the matter is remanded for further proceedings consistent with this opinion. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN,
*Clerk.*

April 16, 1974

## APPENDIX D.

### Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF of BETHLEHEM STEEL CORPORATION,

*v.*

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

*Appellees,*

and

BETHLEHEM STEEL CORPORATION,
*Nominal Defendant*

RICHARD A. ASH,

*Appellant*

(D. C. Civil Action No. 72-1925)
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 17, 1974

Before SEITZ, *Chief Judge*, HASTIE and ALDISERT, *Circuit Judges*.

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Cletus P. Lyman
Attorney for Appellant
1612 Latimer Street
Philadelphia, Pennsylvania

Edwin P. Rome
Jerome R. Richter
William H. Roberts
Attorneys for Appellees

Of Counsel:
Blank, Rome, Klaus & Comisky
Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

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## OPINION OF THE COURT.

(Filed April 16, 1974)

SEITZ, *Chief Judge*.

Plaintiff, a stockholder in Bethlehem Steel Corporation and registered to vote in federal elections, appeals from an order of the District Court for the Eastern District of Pennsylvania denying his request for an evidentiary hearing and granting defendants' motion for summary judgment. Defendants are directors of Bethlehem. The gravamen of plaintiff's complaint is that defendants caused Bethlehem to expend money to help secure the election of the Republican party's 1972 presidential candidate.

Plaintiff asserts that the corporate expenditures, for an advertisement and a pamphlet, violated a federal prohibition on corporate campaign spending, 18 U. S. C. § 610 (1970) as amended (Supp. II 1972). Plaintiff, seeking an injunction and damages, invokes federal jurisdiction over this claim under 28 U. S. C. § 1331 (1970), making the requisite jurisdictional allegations.

The district court's order granting summary judgment merely recited that no material factual dispute existed and that defendants were not liable to plaintiff for the claimed violation of federal law. We presume that this assertion was bottomed on the findings and conclusions relied upon by the district court to support its earlier denial of a preliminary injunction. See 350 F. Supp. 227 (E. D. Pa. 1972). Defendants argue on appeal the propriety of those findings and conclusions and urge that the summary judgment be affirmed on that basis. The major points of the district court's decision are that plaintiff would have no cause of action from defendants' violation of 18 U. S. C. § 610 (1970), as amended (Supp. II 1972), and that, in any event, defendants did not violate § 610.

## I.

Before addressing the points urged by defendants to justify and plaintiff to attack summary judgment, we must consider two matters of justiciability.

### *Mootness*

In affirming the district court's earlier denial of a preliminary injunction, we limited our decision narrowly, holding only that the court's finding of no irreparable harm to plaintiff from denying the injunction was not clearly erroneous. 471 F. 2d 811 (3d Cir. 1973). At that time, however, we noted that the question of mootness

would have to be examined at a later point in these proceedings. *Id.* at 812. As originally drawn, plaintiff's complaint focused on the 1972 presidential election and sought to prevent corporate expenditures from influencing that election. That election is now history. Nonetheless, plaintiff alleges that defendants intend to make similar expenditures in future elections, and defendants, far from denying this, hotly defend their right to do so.

Controversies concerning elections often have presented mootness problems. See, e.g., *Hall v. Beals,* 396 U. S. 45 (1969); *Moore v. Ogilvie,* 394 U. S. 814 (1969). These problems arise since election controversies almost always are spawned shortly before the election, seek prospective relief directed to the election, and reach appellate courts only after the election. Where the basis of such a controversy remains after an election and where the dispute is likely to recur, the case will not be found moot, even where prospective relief alone is sought. *Moore v. Ogilvie, supra* at 816. When this case was before us on appeal of the preliminary injunction denial, the complaint asserted pendent federal jurisdiction over a claim arising under state law; although the complaint was ambiguous, it apparently sought injunctive relief for defendants' alleged violation of federal law and, on behalf of the corporation, damages for the claimed state law violation. Our concern with mootness arose in this context.

Were plaintiff's federal claim pressed solely to secure injunctive relief, we would be required to determine whether plaintiff's bare allegation of defendants' intention to make future similar expenditures would support review, given no showing of a consistent pattern of such conduct and no assurance of plaintiff's continued ownership of Bethlehem stock. After proceedings resumed in

the district court, however, the plaintiff amended this complaint and now clearly demands, in addition to injunctive relief, damages on behalf of the corporation for violation of § 610.[1] Even if plaintiff has no live claim for injunctive relief, the dispute over damages renders this controversy justiciable. See *Powell v. McCormack*, 395 U. S. 486, 495-500 (1969). We need not decide whether plaintiff's claim would be moot if he did not seek damages as well as an injunction.[2]

Question also is raised concerning plaintiff's standing to prosecute this action. As a constitutional matter, all that is required for standing is that the plaintiff have been personally injured or be threatened with such injury and that the injury be directly related to plaintiff's legal claim. *Flast v. Cohen*, 392 U. S. 83, 101 (1968); *Baker v. Carr*, 397 U. S. 186, 204 (1962). Plaintiff alleges economic injury, as a stockholder whose interest in Bethlehem is worth less than it would be had defendants not caused the challenged expenditures to be made, and further injury as a citizen and

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1. Plaintiff in his amended complaint has dropped the allegations contained in the state law count of his original complaint. One allegation from the federal count of the original complaint and carried over verbatim in the amended version, however, declares, without elaboration that defendants violated both state and federal law. Defendants, presuming that plaintiff thus had not abandoned his state claim, moved for summary judgment on the federal claim and dismissal of plaintiff's pendent state claim for want of jurisdiction following judgment for defendants on the only federal matter. The district court does not mention plaintiff's state claim, but merely grants defendants' motion. We assume that if plaintiff did not abandon his state law claim, the district court's order dismissed that claim for want of federal jurisdiction but do not reach the dismissal's propriety.

2. Since the controversy between plaintiff and defendants is not moot, the viability of plaintiff's claim for injunctive relief must be determined, if plaintiff prevails on the merits, according to settled principles controlling the district court's discretion to grant or withhold injunctive relief. *See* J. Moore, 7 Moore's Federal Practice Para. 65.18[3] (2d ed. 1969).

voter whose ability to secure a responsive federal government has been lessened. While these injuries, tangible and intangible, may be small, they are personal to plaintiff, directly related to his claim, and may be remedied by the injunctive and damage relief sought; hence they are sufficient to support plaintiff's standing. See *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U. S. 669, 685-89 (1973), and cases cited *id.* at 689, n. 15.

Plaintiff's standing is not defeated by the fact that his injuries are shared by countless others. Although the Supreme Court's language in *Frothingham v. Mellon*, 262 U. S. 447, 487 (1923), indicated that an injury to many might confer standing to none, *Flast* intimates that *Frothingham* stated policy, not constitutional dogma, *Flast v. Cohen, supra* at 93-94, and *SCRAP* declared that standing is not lost because the harm asserted is universally shared, *United States v. SCRAP, supra* at 686-88. Finally, because we are asked not to review administrative action but to adjudicate private rights, we need not determine whether the statute asserted to provide plaintiff's cause of action places him outside the class permitted to invoke our processes. Cf. *Davis v. Romney*, Nos. 73-1249 & 73-1420, slip. op. at 3-5 (3d Cir. 1974); compare *Flast v. Cohen, supra* at 101-06, and *Baker v. Carr, supra* at 204-08, with *Sierra Club v. Morton*, 405 U. S. 727, 733 (1972), and *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150, 153-54 (1970). Alleging personal injury from defendants' violation of a federal statute, plaintiff may invoke our jurisdiction under 28 U. S. C. § 1331 (1970); questions of statutory construction will be met in determining whether plaintiff has stated a cause of action and in ruling on the merits of his claim.

II.

The district court's decision that defendants were entitled to judgment as a matter of law rested on several legal conclusions, among them that plaintiff failed to state a cause of action. Plaintiff relies upon 18 U. S. C. § 610 (1970), as amended (Supp. II. 1972), as providing his cause of action. Section 610, *inter alia*, makes it "unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any [federal] election . . .," and provides criminal penalties for its violation. Plaintiff contends that, although it expressly provides only penal sanctions, § 610 "implies" a cause of action in his favor.

*Standards for Implied Cause.*

To find a cause of action "implied" in a statute, we must determine (1) that the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains and (2) that it is appropriate, in light of the statute's purposes, to afford plaintiff the remedy sought. *Bivens v. Six Unknown Named Agents*, 403 U. S. 388, 395-97 (1971); *Wyandotte Co. v. United States*, 389 U. S. 191, 200-02 (1967); *J. I. Case Co. v. Borak*, 377 U. S. 426, 431-35 (1964). Finding an implied cause pursuant to these criteria is not entirely an exercise in divining legislative intent. Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent. E.g., *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 42 U. S. L. W. 4132, 4134-35 (U. S. January 9, 1974). Absent some reasonably clear indication of legislative attention to the possible creation of a cause of action, however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means

of effectuating those policies, of affording litigants a particular remedy. *Bivens v. Six Unknown Named Agents, supra* at 395-97 (opinion of the Court), and 402-03, n. 4 (Harlan J., concurring); *Holloway v. Bristol-Meyers Corp.*, 485 F. 2d 986, 989-99 (D. C. Cir. 1973).

We are urged to find that this process of judicial policy consideration to determine whether an "implied" cause of action can be asserted was rejected by the Supreme Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra* (hereinafter "*Amtrak*"). Relying on the maxim *expressio unis est exclusio alterius* [expression of one thing is exclusion of others], the Court declared in *Amtrak* that ". . . when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Id.* at 4134. This rule of statutory construction does not alter the process used to determine if a cause should be inferred in the absence of statutory language indicating legislative intent; rather, it aids the court merely in determining when legislative intent to preclude a remedy can be fairly implied.[3]

For the *Amtrak* rule to apply, the statute must expressly provide the plaintiff a remedy that may logically be said to be exclusive. In *Amtrak*, the remedy expressly provided to correct the harm of which plaintiffs complained was a civil action prosecuted by the Attorney General. 45 U. S. C. § 547 (1970). In the instant case, no express civil

3. The extent to which the Supreme Court relied on the rule of statutory construction in *Amtrak* is unclear. After announcing the rule, the Court went on to find evidence of a clear legislative intent to withhold the remedy sought, National R. R. Pass. Corp. v. National Ass'n of R. R. Pass., 42 U. S. L. W. 4132, 4134-35 (U. S. Jan. 9, 1974); the Court also examined the policies, as it conceived them, behind the "Amtrak Act", Railroad Passenger Service Act of 1970, 45 U. S. C. §§ 501, *et seq.* (1970), and found that implication of a private remedy there would be inconsistent with those policies, *id.* at 4135-36.

action is provided to remedy plaintiff's, or any other, alleged injury.[3a] Only a criminal sanction is expressly provided for violation of § 610. Courts have consistently held that statutes providing for criminal liability do not preclude assertion of private causes of action. E.g., *Wyandotte Co. v. United States, supra* at 200-02; *Texas & Pacific Railway Co. v. Rigsby*, 241 U. S. 33, 39-41 (1916). In *Rigsby* the Supreme Court, inferring a private cause of action for violation of a criminal provision, distinguished "remedial" from "penal" application of a statute. *Id.* at 41. Thus, since § 610 cannot be said to provide any remedy for the alleged harm to plaintiff here, *Amtrak* would not preclude finding an implied cause.

*Statutory Design.*

Our inquiry, then, must be, first, whether § 610 was designed to protect plaintiff from the harm he alleges. Section 610 is the end-product of a series of enactments limiting campaign giving and spending. See *United States v. UAW*, 352 U. S. 567, 570-84 (1957). In discussing the

3a. Judge Aldisert notes that, in contrast to title II of the Federal Election Campaign Act of 1971, amending *inter alia* § 610, title III expressly provides a civil cause of action to the Attorney General. This provision referred to by Judge Aldisert allows the Attorney General to institute a civil action for violation of certain reporting and disclosure requirements imposed on candidates and campaign committees. These requirements were first imposed by the 1971 Act and criminal penalties for their violation were first provided in the 1971 Act.

Provision of this civil remedy may well bar inference of a private remedy for violation of these reporting and disclosure requirements. We do not, however, believe that any intent to bar the remedies sought here can be inferred from the 1971 Act's grant of a civil, as well as a criminal, action for violation of conduct first proscribed in 1971 and its failure to grant any civil remedies for conduct prohibited since 1907. Amtrak certainly does not require that such an inference be drawn from the 1971 Act's amendment of long-standing criminal provisions coincidentally joined, albeit in separate titles, with promulgation of new civil and criminal actions.

seminal federal limitation on corporate campaign contributions, carried forward into the present § 610, the Supreme Court stated that it was "motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials have no moral right to use corporate funds for contribution to political parties without the consent of the stockohlders." *United States v. CIO*, 335 U. S. 106, 113 (1948) [footnotes omitted].

As a voter and citizen, plaintiff is within the class Congress sought to protect by prohibiting corporate expenditures in campaigns for federal office; Congress, in the various enactments embodied in § 610, declared its view that such expenditures reduced the ability of voters to secure a government responsive to their wishes and increased the likelihood of governmental actions favorable to particular economic blocs but inimical to the general welfare. *Id.;* 117 Cong. Rec. 43379-81 (1971) (remarks of Congressman Hansen).

As a stockholder, plaintiff is within the class secondarily protected by § 610, which keeps control over political contributions in his hands and not in those of corporate managers or directors. *Id.;* 117 Cong. Rec. 43384-85 (remarks of Congressman Thompson). The harm to plaintiff as a voter and citizen, while not set forth explicitly in his complaint, is presumably the intangible harm foreseen by Congress. The alleged harm to plaintiff and other Bethlehem stockholders is the loss of over one-half million dollars from the corporation's treasury for the challenged expenditures.[4] Clearly plaintiff satisfies that first require-

4. In focusing on the harm to plaintiff and the propriety of according him a remedy, we are aware that damages are sought not for plaintiff as an individual stockholder but in the form of a derivative action, for all injured stockholders. Where stockholders suffer in-

ment for determining a cause of action to be implied in § 610.

Defendants contend, however, that Congressional intent to protect voters, citizens and stockholders does not satisfy the implied cause test. First, defendants argue that § 610 primarily protects not voters and citizens but the public in general and that a cause of action will only be implied to protect members of a specific, limited class. We reject defendants' argument that provisions designed for the protection of the entire American public cannot give rise to implied causes. See *Bivens v. Six Unknown Named Agents, supra* (finding a private cause of action implied in the Fourth Amendment's protection of "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . . ."). The breadth of the protected class is, however, relevant to the propriety of allowing criminal sanctions, rather than private actions, to enforce a statutory prohibition and will be considered below.

Second, defendants argue that no cause of action may be implied to protect plaintiff *qua* stockholder because such protection was only a secondary purpose of § 610. Although it may be improper to infer a cause of action from a statute only incidentally protecting plaintiff, the Supreme Court has indicated that protection of stockholders was not merely an incidental purpose of § 610, *United States v. CIO, supra* at 113, and protection of plaintiff need not be the act's primary purpose. See *J. I. Case Co. v. Borak, supra* at 431-32; cf. *Wyandotte Co. v. United States, supra.*

*Propriety of Private Action.*

In determining the propriety of affording plaintiff a cause of action for violation of § 610, we must ascer-

4. (Cont'd.)
jury jointly from violation of federal rights, a derivative action may be an implied remedy. *See* Drachman v. Harvey, 453 F. 2d 722, 736-38 (2d Cir. 1972) (in banc).

tain whether such a remedy will effectuate the act and whether any "collateral" considerations counsel withholding this remedy. Since the purpose of the section is to prevent certain expenditures, allowing suit to enjoin or recover such expenditures would seem to be consistent with accomplishment of § 610's goal. Although the breadth of § 610's coverage favors enforcement solely by criminal sanction to avoid a multiplicity of possible suits challenging intangible public harm,[5] the intent to protect many people from many possible violations also favors individual suits to enforce the act as the number of putative defendants, committing acts more likely to be covert than notorious, is so great that government enforcement alone might prove insufficient, cf. *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F. 2d 649, 651 (3d Cir. 1967). We note that stockholders, able to protect their investments by recovering damages on behalf of the corporation, may be expected to be particularly vigilant in detecting violation of § 610.

The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical; plaintiff alleges that in the instant case non-enforcement of § 610 by the Justice Department was due to the Department's control by the candidate defendants supported.[6]

5. This objection pertains to suits by non-stockholder citizens. Here, of course, plaintiff sues not only as a citizen and voter but also as a stockholder of the allegedly offending corporation, a narrower class suffering tangible harm. We recognize also that the number of putative § 610 plaintiffs would be much smaller where, for instance, a Congressional rather than Presidential election is involved.

6. Among reasons cited by the district judge for concluding that plaintiff lacked a cause of action was his willingness to "assume the

The relative expeditiousness possible in civil, contrasted with criminal, proceedings also supports implication of a cause here. The section's primary focus is on preventing the corruption of elections by corporate contributions. Violations of § 610 are, we presume, most likely to occur in the period immediately preceding an election, and, given the delays incident to criminal investigation and grand jury indictment as well as trial, the election may well be over before the section's violation is determined. Private enforcement, particularly by injunction, can be relatively swift.

We note no countervailing reason for denying private remedies here. The matter before us involves none of the "special circumstances" discussed in *Borak* as counseling denial of a private cause of action. See *J. I. Case Co. v. Borak, supra* at 396-97. Nor does § 610 involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement. See *Holloway v. Bristol-Meyers Corp., supra* at 990-92, 997-1002. Thus, we find allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief, proper to remedy violation of § 610.[7]

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6. (Cont'd.)
partisan enforcement of the Act as plaintiff suggests." 350 F. Supp. at 231. We make no such assumption here. While plaintiff has alleged, and presumably stands ready to prove, partisan enforcement of § 610, our finding of a cause of action is supported simply by the possibility of such enforcement, or non-enforcement—presence or absence of actual partisan enforcement in this case is irrelevant to our determination.

7. The propriety of awarding such relief must depend on the circumstances of each case. We note also that where a non-stockholder plaintiff sues, presumably only for injunctive relief, there may be a question as to the plaintiff's ability to satisfy the $10,000 jurisdictional amount for 28 U. S. C. § 1331 (1970).

III.

The district court concluded, defendants contend rightly, that even if plaintiff were found to have a cause of action under § 610, defendants would be entitled to judgment as a matter of law. 350 F. Supp. at 231-32. The court decided that the meaning of "contribution or expenditure" in § 610 was governed by the definition of those terms in 18 U. S. C. § 591 (1970), as amended (Supp. II 1972); that § 591 requires a purpose to influence the nomination or election of a particular person; and that defendants' advertisements and pamphlets were designed not to influence election of any person but to advocate an honest campaign and "respond to an accusation leveled against the business community." *Id.* Plaintiff contests and defendants support each of these conclusions.

*Scope of § 610.*

Plaintiff disagrees with judging Bethlehem's expenditures by the § 591 definition of that term, claiming that § 610 contains a more specific definition of the term, which should control here. Section 591, in relevant part, reads:

> When used in sections 597, 599, 600, 602, 608, 610 and 611 of this title—
>
> • • •
>
> (f) "expenditure" means—
>
> (1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . ., made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . .

Section 610, as pertinent, states that "[a]s used in this section, the phrase 'contribution or expenditure' shall in-

clude any direct or indirect payment . . . to any candidate, campaign committee, or political party or organization . . . . ." Corporate communication to stockholders and non-partisan "get-out-the-vote" drives aimed at stockholders and their families are explicitly excluded.

The definition given "expenditure" in both sections traces back to the Federal Election Campaign Act of 1971, P. L. 92-225, Title II, §§ 201, 205, 86 Stat. 3. The drafters clearly intended § 591's definition to affect interpretation of § 610, for they expressly provided that the definitions in § 591 applied to use of those terms in § 610. We note also that § 591 indicates the "meaning" of expenditure while § 610 only indicates certain matters "included" in that term. We therefore read § 610 as supplementing rather than replacing § 591's definition. Nothing specifically included as an expenditure for § 610, however, covers Bethlehem's challenged actions. Thus, it appears that the district court was correct in concluding that Bethlehem's challenged expenditures are not proscribed unless they fall within §591's definition of "expenditure."

An integral part of § 591's definition of prohibited expenditures is the requirement that they be for the purpose of influencing someone's election to federal office—in other words, § 591 requires a partisan purpose. Plaintiff argues, however, that § 610, by negative implication in its exclusion of only some non-partisan get-out-the-vote drives, makes unlawful other get-out-the-vote drives, even though non-partisan. Plaintiff supports his contention by reference to legislative history.

Several comments by key Congressman in debate over the most recent amendment to § 610 indicate that the section now would prohibit a non-partisan get-out-the-vote drive if financed from a corporation's general treasury and aimed at the general public. See, e.g., 117 Cong. Rec. 43380-81

(remarks of Congressman Hansen), 43381 (remarks of Congressmen Hansen and Hays), 43387-88 (remarks of Congressmen Ashbrook, Hansen and Hays). The debates also indicate that members of Congress had a fairly specific and limited type of activity in mind when speaking of "get-out-the-vote" drives, primarily door-to-door canvassing and escorting people to the polls, see *id.* at 43386 (remarks of Congressman Crane), 43387 (remarks of Congressman Ashbrook), 43388 (remarks of Congressman Hays), and that the primary concerns with such drives were, first, that they were generally non-partisan in name only, and, second, that their partisanship was not often apparent to observers, see *id.* at 43388 (remarks of Congressman Ashbrook), 43390 (remarks of Congressman Steiger).

*Application of § 610.*

The expenditures challenged here were for activities that would not seem to have the hallmarks of a "get-out-the-vote" drive—Bethlehem's communications were in writing and aimed at the entire public, rather than selected portions, so their partisanship, if any, could be readily determined. We would not, on the present record, find Bethlehem's expenditures for these communications, if non-partisan, to be proscribed by any prohibition on non-partisan get-out-the-vote drives that may be implicit in § 610. We turn to the inclusion or exclusion of these expenditures from the definition of that term in § 591.

The district court found that Bethlehem's expenditures were non-partisan and thus outside the sweep of § 591 and, hence, of § 610. This finding rests on the fact that no candidate or party was named in the corporation's ad and pamphlet. Unless § 591 requires that a candidate or party be named, the district court's grant of summary judgment cannot be upheld; the partisanship of Bethlehem's state-

ments is a factual question as to which the parties are in dispute,[8] and on summary judgment we must accept as true plaintiff's allegation of partisanship. See *Johnson v. Alldredge*, 488 F. 2d 820, 823 (3d Cir. 1973).

Nothing in the language or legislative history supports an interpretation of sections 591 and 610 that would make lawful an expenditure simply because in the communication it paid for no candidate was named. There is no evidence Congress thought the American public so unperceptive that it would recognize a statement as supporting or attacking a particular candidate only by use of his name; such a requirement would eviscerate § 610. Since dispute exists as to a material factual issue, the district court erred in granting summary judgment and denying plaintiff's motion for an evidentiary hearing.

## IV.

Defendants contend that § 610 is unconstitutional, urging a variety of grounds. Although defendants do not treat their various constitutional contentions separately, their underlying argument appears to be that, if applied to prohibit non-partisan political speech, § 610 would violate the First Amendment. Because we have decided that § 610 would proscribe Bethlehem's expenditures only if they financed partisan communications, we do not reach defendants constitutional contentions. See *United States v. UAW*, *supra* at 591-92. We note that the district court has never passed on these contentions and that they may be reasserted on remand.

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8. The definition of expenditure in § 591 requires a partisan purpose; we assume here that where a communication is the expenditure's direct product, the partisan purpose must appear from the communications content, viewed in light of surrounding circumstances.

The judgment of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

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ALDISERT, *Circuit Judge*, dissenting.

Standing in this case does not trouble me. This is not a taxpayer's suit, *Flast v. Cohen*, 392 U. S. 83 (1968), *Frothingham v. Mellon*, 262 U. S. 447 (1923); nor a suit to obtain judicial review of agency action, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U. S. 669 (1973), *Sierra Club v. Morton*, 405 U. S. 727 (1972), *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970); nor a voter's complaint alleging impairment of his right to vote, *Baker v. Carr*, 369 U. S. 186 (1962). Only the damages aspect of the complaint has survived the mootness of the injunctive request. Thus, the claim is reduced to a garden variety case or controversy in which a plaintiff stockholder asserts economic harm to the corporation for which he has standing derivatively on behalf of the corporation. *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727 (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971).

I have heretofore expressed discomfort with certain decisions of this court regarding standing. *See, United States v. Richardson*, 465 F. 2d 844 (3d Cir. 1972), (Adams, J., dissenting, joined by Aldisert and Hunter, JJ.), and *Schiaffo v. Helstoski*, — F. 2d — (3d Cir., Nos. 72-2167/68, January 4, 1974) (Aldisert, J., dissenting). And I would hope that the district courts and courts of appeals will soon receive definitive guidance in this "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circum-

stances of individual situations. . . .''[1] The Supreme Court has heard argument in two important standing cases, *United States v. Richardson, supra,* (No. 72-885, argued October 10, 1973), 42 U. S. L. W. 3216, and *Richardson v. Reservists Committee to Stop the War,* (No. 72-1188, argued January 14, 1974), 42 U. S. L. W. 3418.

The standing issue aside, I would affirm the district court because I find that Congress has not provided a civil remedy for the plaintiff expressly or by implication. While an implied right of action may be rationalized with considerable persuasion, this can be done only by defying the Supreme Court's recent pronouncement in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* — U. S. — (42 U. S. L. W. 4132, January 9, 1974) (Amtrak). I see Amtrak to be a definite signal to the courts of appeal and district courts to decelerate use of excerpts from Justice Clark's opinion in *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-432 (1964), to find implied civil remedies not expressly authorized by Congress. Three bright warning lights were flashed in Amtrak:

> 1. ''[T]he inference of . . . a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.''
>
> 2. ''A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States,* 278 U. S.

1. *United States ex rel. Chapman v. Federal Power Commission,* 345 U. S. 153, 156 (1953).

282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.*"

3. "[T]he most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. *Neuberger v. Comm'r,* 311 U. S. 83, 88 (1940)."

42 U. S. L. W. at 4134.

I.

Amtrak's first principle, the imperative to ascertain legislative intention, requires that we examine the entire legislative package known as the Federal Election Campaign Act of 1971. This case is brought under Title II of the Act, containing amendments to Title 18 of the United States Code, including 18 U. S. C. § 610. There is no express provision for a civil remedy, public or private, in Title II. By contrast, Title III of the Act authorizes the Attorney General on behalf of the United States to commence a civil action for violation of its subchapter. *See,* 2 U. S. C. § 438 (d)(1)-(5). This public cause of action in Title III supplements the penal provision of that Title, 2 U. S. C. § 441. *See also,* 11 C. F. R. §§ 20.10 and 20.11. In *T. I. M. E., Inc. v. United States,* 359 U. S. 464 (1959), the Court refused to imply a private right of action in favor of shippers under the Motor Carrier Act of 1935, 49 U. S. C. § 316(b) and (d) (Interstate Commerce Act, Part II), for overcharges by certified carriers. The government, as a shipper, brought suit against the carrier contending that this language imposed a statutory duty on motor carriers not to charge or collect other than "reasonable" rates and urged that a cause of action be implied. The Supreme Court refused to imply a cause of action. Noting that the provisions of Part I and III of the Interstate Commerce Act, relating to rail and water carriers, granted a private remedy to ship-

pers, the Court emphasized that similar provisions were conspicuously absent in Part II relating to motor carriers. The Court said that creation of a remedy under these circumstances "would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I." 359 U. S. at 471. I would apply the *ratio decidendi* of *T. I. M. E., Inc.*, to these proceedings.

Further, Congress recently has had occasion to reexamine § 610. In the course of amending this section and enacting the Federal Election Campaign Act of 1971, Congress did not provide a private remedy to supplement the express criminal sanctions.

I detect no language in this Act manifesting Congressional intent to create a private right of action by implication similar to *J. I. Case Co. v. Borak, supra*, and *Texas & Pacific Railway Co. v. Rigsby*, 241 U. S. 33 (1916). I therefore would accept the cogent reasoning of the Tenth Circuit in *Chavez v. Freshpict Foods, Inc.*, 456 F. 2d 890, 895 (10th Cir.), *cert. denied*, 409 U. S. 1042 (1972):

> We recognize that the tripartite classification of governmental powers—legislative, executive and judicial—has no absolutes, and that governmental functions are not easily defined as "legislative", "executive" or "judicial". But in the cases at bar the substantive rights relied upon by the appellants have been promulgated by Congress in the exercise of its power to enact penal statutes. In effect, appellants urge this court, under its classical adjudicative power, to legislate. When Congress was dealing with the subject matter of the statutes here involved, it was capable of clearly and directly providing the rights and remedies urged by the appellants.

II.

I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar "principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*"

III.

Amtrak's third principle, that statutory construction must yield to clear contrary legislative intent, renews the previous emphasis on Congressional intent. But appellant conceded at oral argument that the Congressional history is devoid of any reference to a private civil remedy. Therefore, we lack any semblance of contrary legislative intent, let alone clear contrary legislative intent.

It seems to me, therefore, that a discussion of the necessity for destroying the influence over elections which corporations exercise through financial contributions and the recognition that corporate officials have no right to use corporate funds improperly, *United States v. C. I. O.*, 335 U. S. 106, 113 (1948), is simply irrelevant to the narrow issue posed by this appeal: whether it can be properly concluded that a private civil right of action may be implied to supplement the penal provisions of Title II. Our polestar is Congressional intention. To imply such a right is to presume that Congress intended to provide for such an action, but overlooked its inclusion when the Federal Corrupt Practices Act was originally enacted, and that Congress overlooked it again when it enacted the comprehensive Federal Election Campaign Act of 1971. I cannot impute

such derelictions to a Congress vitally concerned in a matter so universally discussed and the subject, if not all-consuming, public interest.

The Supreme Court's entreaty for restraint in Amtrak is justified. Otherwise a reasoned case for an implied private right of action could be constructed within the framework of every federal criminal statute simply by showing that plaintiff is "within the class Congress sought to protect by prohibiting" certain conduct. Three comprehensive criminal codes have been introduced in the 93rd Congress: S. 1., "Criminal Justice Codification, Revision and Reform Act of 1973," described by its proponents, Senators McClellan, Ervin, and Hruska, as the lengthiest bill ever introduced in the Senate, exceeding the Internal Revenue Code of 1954; H. R. 6046; S. 1400, "Criminal Code Reform Act of 1973"; and H. R. 10047, reflecting the recommendations of the National Commission on Reform of Federal Criminal Laws, styled "Federal Criminal Code Reform Act of 1973." Every criminal statute is designed to protect some individual, public, or social interest. The criminal statutes define offenses involving danger to the person, against property, against public order, health, safety and sensibilities, as well as offenses against national security, foreign relations, immigration and nationalization, integrity and effectiveness of government operations, internal revenue and customs, civil rights and elections. Is it to be inferred that Congress is also considering an unwritten, but *intended*, comprehensive civil code at the same time? I don't think so.

If the "ambit of protection" test were to be applied to every criminal statute by the court, then it would follow that, given particular circumstances, a remedy could be fashioned to afford civil relief upon the breach of every criminal statute. And thus the federal judiciary, and not

the Congress, would be defining the metes and bounds of federal court jurisdiction. But there is no authority for this, because it is the Congress, and not the federal judiciary, which creates subject matter jurisdiction for the federal courts. *See, Sheldon v. Sill,* 8 How. 440, 12 L. Ed. 1147 (1850); *Ex Parte McArdle,* 7 Wall. 506, 19 L. Ed. 264 (1869).

I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of *J. I. Case Co. v. Borak, supra,* and an overgenerous use of Justice Black's overgenerous quotation in *Bell v. Hood,* 327 U. S. 678, 684 (1946), that "federal courts may use any available remedy to make good the wrong done." I am convinced that the Amtrak court consciously and deliberately applied the brakes and meant exactly what it said when it declared that a "private cause of action not otherwise authorized by statute" may not be implied in the absence of clear "evidence of legislative intent."

Although I recognize that the Presidential election of 1972 is a matter of dominant national, sociological and political interest in 1974, an imperative of a detached decisional process commands that neutral principles of construction be employed in all our cases because of the precedential or institutional effect of our determinations. To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code. And to do this is to suggest that for every written volume of Title 18 of the United States Code there is an unwritten volume of Title 28.

Because I cannot begin to accept this notion, I would affirm the judgment of the district court.

## APPENDIX E.

### The Order of the District Court Granting Summary Judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 72-1925.

RICHARD A. ASH

*v.*

STEWART S. CORT ET AL.

ORDER.

AND NOW, this 11th day of July, 1973, upon a finding that the issue whether plaintiff has an implied right to prosecute a cause of action under 18 U. S. C. §610 is a question of law to be determined by the Court based upon, *inter alia,* the language, legislative history and purpose of the Act, IT IS ORDERED that plaintiff's motion for an evidentiary hearing and for continuation of defendants' motion for summary judgment is DENIED. In addition, upon consideration of the entire record, oral argument and briefs submitted by the parties and upon a finding (1) that no legal basis has been presented by the plaintiff to justify the relief sought, and (2) that no genuine issues of material facts exist, IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

/s/ E. MAC TROUTMAN,

*J.*

## APPENDIX F.

**The Findings of Fact, Conclusions of Law and Order of the District Court Denying a Preliminary Injunction.**

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 72-1925.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF, AND
ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

*v.*

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS

THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS
ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION
AND
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

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OCTOBER 25, 1972.

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Cletus P. Lyman, Philadelphia, Pa., for plaintiff.
Edwin P. Rome, Philadelphia, Pa., for defendant.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

TROUTMAN, *District Judge.*

The Court, having considered the verified complaint, the answer and a stipulation of facts entered into by respective counsel and having heard oral argument, now makes the following findings of fact and conclusions of law pursuant to F. R. Civ. P. 52(a).

### FINDINGS OF FACT.

1. Plaintiff resides in Philadelphia, Pennsylvania, is a United States citizen, and is registered and able to vote in the United States presidential election on November 7, 1972.

2. Plaintiff is and was at all times relevant hereto the owner of fifty shares of common stock of Bethlehem Steel Corporation.

3. Bethlehem Steel Corporation (Bethlehem) is a Delaware corporation engaged primarily in the business of steel

production, with a principal office in Bethlehem, Pennsylvania.

4. Bethlehem is the second largest producer of steel in the United States, and in 1971 it had net sales of approximately $2,963,602,000 and net income of approximately $139,239,000.

5. Bethlehem had on September 30, 1972 about 202,670 stockholders who owned about 44,469,541 shares of common stock, which were outstanding on that date. The market value of each share of common stock during 1972 has ranged from a high of $34⅝ to a low of $25⅞, and the closing value of a share of common stock on October 16, 1972 was $25⅞. Plaintiff, who owns fifty shares of such common stock, has owned said stock for more than one year.

6. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem included in the mailing envelope sent to each stockholder a reprint of an advertisement (the "Advertisement") entitled, "I say, let's keep the campaign honest. Mobilize 'truth squads' . . . .". (Exhibit A)

7. The advertisement appeared from on or about August 22, 1972 until September 7, 1972, in various media of national and local circulation, including "Newsweek", "Time", "U. S. News and World Report", "Business Week", "Saturday Review", "Editor and Publisher" and nineteen local newspapers in towns in which Bethlehem has plants.

8. Various magazines in which the advertisement appeared, including "Time", "Newsweek" and "U. S. News and World Report" are distributed nationally to subscribers and by sale at newsstands throughout the United States.

9. "Time", "Newsweek" and "U. S. News and World Report" are published weekly and have substantial circulation.

10. The Public Affairs Department of Bethlehem as indicated in the advertisement will send to each person on request a copy of Mr. Cort's speech entitled "Speak Out for Truth", and a copy of a folder entitled "How you can help to keep the campaign honest".

11. The placement and purchase of the advertisement and the printing and mailing of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" have been, and are being paid for out of the general corporate funds of Bethlehem.

12. Bethlehem may cause the advertisement to appear in the future in media of national and local circulation.

13. The mailing by Bethlehem of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" is continuing at present and may continue in the future. Approximately 5,500 copies of the speech and folder have been sent.

14. A Federal election is scheduled for November 7, 1972, at which voters will have an opportunity to vote for electors for the Presidency and Vice-Presidency of the United States, and for various other Federal offices, including members of Congress.

15. The advertisement, the speech and the folder do not mention by name any person currently a candidate for any local, state or Federal office, and they do not endorse or disparage the candidacy of any person currently seeking election to any local, state or Federal office.

16. The advertisement, the speech and the folder state a variety of viewpoints on issues which voters may face in

the upcoming elections, without identifying any particular candidate with any particular political view.

DISCUSSION.

Beginning on August 22, 1972, the "advertisement" about which plaintiff complains appeared in various news media and was distributed to shareholders of the defendant corporation, Bethlehem Steel Corporation, on September 11, 1972. On October 16, 1972, plaintiff formally filed a complaint seeking a preliminary injunction restraining such advertisement. On October 11, 1972, at about 5 P. M., plaintiff applied for a temporary restraining order. After notice, hearing was held on October 13, 1972, and said application was denied. Thereafter, the parties conferred and appeared before the Court on October 20, 1972, submitting a stipulation of facts in lieu of testimony, upon which we base the foregoing "findings of fact". Proposed amended findings and conclusions were submitted to the Court on October 24, 1972, and because of the coming Federal election on November 7, 1972, plaintiff seeks an immediate decision. Therefore, time does not permit the preparation and filing of an expanded and detailed discussion and opinion.

For the purpose of this application for a preliminary injunction, it is sufficient to say that a party seeking a preliminary injunction must establish by clear, positive proof the existence of four essential preconditions to the granting of injunctive relief: (1) irreparable harm to himself absent an injunction; (2) the absence of substantial harm to the defendants; (3) the absence of harm to the public interest; and (4) a likelihood that he will prevail on the merits. Winkleman v. N. Y. Stock Exchange, 445 F. 2d 786, 789 (3d Cir. 1971); Nelson v. Miller, 373 F. 2d 474, 477 (3d Cir. 1967). Failure to adequately establish at least a reasonable probability of success on the merits justifies denial of an

injunction on this ground alone. Industrial Electronics Corp. v. Cline, 330 F. 2d 480, 482 (3d Cir. 1964).

Title 18 U. S. C. § 591, as amended, defines, as follows, the term "expenditure" as otherwise used in the Act:

> "(f) 'expenditure' means—
>
> (1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), *made for the purpose of influencing the nomination for election, or election, of any person to Federal office,* for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;
>
> (2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and
>
> (3) a transfer of funds between political committees." (Emphasis supplied)

Thus, as defined, it contemplates a specific purpose; i.e., influencing the election of a person to Federal office. Title 18 U. S. C. § 610 then continues:

> "§ 610. *Contributions or expenditures by national banks, corporations, or labor organizations.*
>
> "As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect

payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization; *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

It is a criminal statute imposing, for its violation, a fine and penalty.

Thus, at the very threshold, the plaintiff must establish an implied cause of action under said statute. Civil actions may be implied from criminal statutes designed to protect a specific class. Common Cause v. Democratic National Committee, 333 F. Supp. 803 (D. D. C. 1971). The purpose of

Section 610 is to assure a popularly elected government for all the people in the United States and its main concern is to "eliminate the effect of aggregated wealth on federal elections". Pipefitters Local No. 562 et al. v. United States, 407 U. S. 385, 92 S. Ct. 2247, 33 L. Ed. 2d 11 (1972). True, a secondary concern of Section 610 is to protect dissenting or minority shareholders, of which plaintiff is one. Thus, since the *primary* purpose of the Act was to protect the public, rather than dissenting shareholders, a substantial showing of congressional intent is required to provide an implied cause of action. Congress expressly vested in the Department of Justice the authority to enforce the Act. The sanctions imposed are purely penal in nature. On this record, we cannot hold, as plaintiff contends, that a private cause of action must be implied because the Department of Justice resources are inadequate to enforce the Act and thereby are inadequate to protect the public interest. Neither can we assume the partisan enforcement of the Act as plaintiff suggests. We, therefore, hold that the penal sanctions imposed are exclusive and that no private cause of action is implied. Chavez v. Freshpict Foods, Inc., 456 F. 2d 890 (10th Cir. 1972). For this reason alone an injunction must be denied.

The second issue arises, namely, whether the advertisement constitutes a violation of Section 610, which proscribes any expenditure or contribution to a candidate, campaign committee, political party or organization in connection with any Federal election. Section 591 defines expenditure as used in Section 610 as ". . . anything of value . . . for the purpose of influencing the nomination for election, or election, of any person to Federal office." Here, the ostensible purpose—apparent on the face of the advertisement—is to mobilize and seek honest campaigns. Only incidentally does it seek to refute the statement of an un-

named candidate for political office. There is nothing in the Act which suggests a corporation or a labor union must sit idly by as accusations are being made against it or the industry or segment of the business community of which it is a part. The advertisement or article is not directed to the election of a specific person or persons or, indeed, of any persons to Federal office, as contemplated by 18 U. S. C. § 591(f). Neither is it directed to a specific candidate, campaign committee, political party or organization, as contemplated by 18 U. S. C. § 610.

We conclude that the purpose of the advertisement was not to influence the election of a specific candidate, but rather to seek an honest campaign and election and, incidentally, to respond to an accusation leveled against the business community. Thus, the payment for the advertisement did not constitute an "expenditure" within the meaning of Section 591(f) and Section 610.

A third issue arises in that defendants challenge the constitutionality of the Act. We need not reach the constitutional issue. Under the facts and circumstances of this case, we have construed the term "expenditure" to exclude a situation where, as here, a corporation (or a labor union) expends its general funds to communicate to the public (a) its views as to honest campaigns and elections, an issue vital to its corporate interest and to the public; (b) its views as to a statement made by an unnamed candidate for election aimed at the community of which it is a part; and (c) without advocating the election of any particular person or party.

In thus construing the term "expenditure", we need not decide whether the statute is overbroad in that it unduly infringes upon the First Amendment rights of either corporations or labor unions.

Accordingly, on the basis of the record before us, we make and enter the following

CONCLUSIONS OF LAW.

1. The Court has subject-matter jurisdiction over Count I of the complaint, pursuant to 28 U. S. C. § 1331.

2. The Court has personal jurisdiction over defendant, Bethlehem Steel Corporation.

3. Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

(a) plaintiff has no private right of action under 18 U. S. C. § 610;

(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not "contributions or expenditures" within the meaning of 18 U. S. C. § 610;

(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not "expenditures" made for the purpose of influencing the nomination for election, or the election of any person to Federal office" and, hence, are not "expenditures" within the meaning of 18 U. S. C. § 591(f)(1);

(d) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder did not constitute "active electioneering directed at the general public on behalf of a candidate in a Federal election" as defined in the legislative history to the recent amendment of 18 U. S. C. § 610; Congressional Record, November 30, 1971, H 11477, 11478;

(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder would prevent a corporation

from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;

(f) under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of crucial concern to it and to the public, thus preventing a public debate on such issues.

4. Plaintiff has failed to prove that injunctive relief would not cause substantial harm to defendants.

5. Plaintiff has failed to prove that injunctive relief would not be harmful to the public interest.

6. In failing to prove a likelihood of success on the merits, plaintiff has failed to prove that irreparable harm would result if an injunction is not granted.

A preliminary injunction will be denied.

# I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation

Why do I see this need? Because several months ago ve lived through a number of political primary cam- aigns. And it ought to be clear to all of us that there ave been times when truthfulness took an awful beat- ng. And now we have a presidential campaign ahead, uring which we can clearly see a lot more of the same.

I'm thinking of the careless rhetoric and accusations hat are being thrown around these days—their main arget being the business community.

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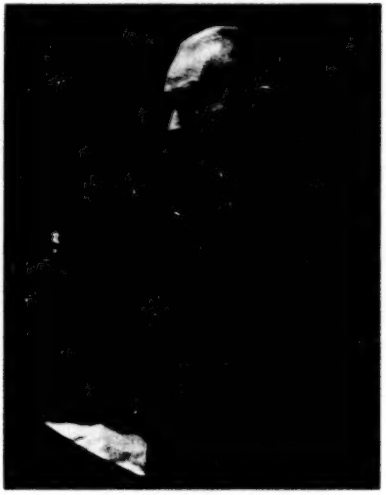
And when outrageous accusations are reported in the nedia, you ought to refute them immediately. You can lo it if you're properly prepared. Plan to attend politi- al functions and stand up when spokesmen are off ase. Concerned citizens ought to do this; it's nothing nore than true democracy in action."



*From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.*

*As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."*

*His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.*

*"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."*

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016.

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## APPENDIX G.

### 18 U. S. C. § 610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which emloy-

ees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

**Federal Election Campaign Act of 1971, P. L. 92-225.**

Title II, Section 205:

Section 610 of title 18, United States Code, relating to contributions or expenditures by national banks, corporations, or labor organizations, is amended by adding at the end thereof the following paragraph:

> "As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of

value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

**Federal Election Campaign Act of 1971, P. L. 92-225.**

Title II, Section 201:

Section 591 of title 18, United States Code, is amended to read as follows:

§ *591. Definitions.*

"When used in sections 597, 599, 602, 608, 610, and 611 of this title—

"(a) 'election' means (1) a general, special, primary, or run-off election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (5) the election of delegates to a constitutional convention for proposing amnedments to the Constitution of the United States;

"(b) 'candidate' means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify

himself for nomination for election, or election, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

"(c) 'Federal office' means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

"(d) 'political committee' means any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

"(e) 'contribution' means—

"(1) a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a consti-

tutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

"(3) a transfer of funds between political committees;

"(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; and

"(5) notwithstanding the foregoing meanings of 'contribution', the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;

"(f) 'expenditure' means—

"(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating conven-

tion of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(3) a transfer of funds between political committees;

"(g) 'person' and 'whoever' mean an individual, partnership, committee, association, corporation, or any other organization or group of persons; and

"(h) 'State' means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.".

**First Amendment to the Constitution of the United States.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Fifth Amendment to the Constitution of the United States.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# "I say let's keep the campaign honest. Mobilize 'truth squads'..."

**Stewart S. Cort, *Chairman***
**Bethlehem Steel Corporation**

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

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# SPEAK OUT FOR TRUTH

by

STEWART S. CORT
Chairman
Bethlehem Steel Corporation

Rotary Club
Jacksonville, Florida
June 12, 1972

*Stewart S. Cort*

The title of my talk consists of four words of advice: "Speak Out For Truth."

Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same.

I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind:

In a recent speech in Pittsburgh, a prominent presidential candidate said this: "What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the money-changers out of the temple."

At a conference in Washington last month a potential presidential candidate said this: "To me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the American working man."

As for business taxation, one of the candidates said this: "The time has come for a tax system that says to big business—you must pay your fair share."

That's a reasonable demand, but it implies that we aren't already paying our "fair share." My own company has been tagged with that sort of accusa-

tion despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 *billion* for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden.

But corporations aren't the only targets. One candidate talks about "$28 billion in tax loopholes for the rich and powerful" and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are "far to the left of Norman Thomas."

Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else.

As is perfectly clear to you, I don't share the views of those extreme critics of our society. But I certainly do admit that severe criticism is very much in fashion. It has all the earmarks of a vote getter. It'll get votes from the ideological extremes, from both extremes. It'll get votes from those who are terribly disillusioned, frustrated, and fearful. And it'll get votes from people who don't have that one commodity that has always sustained the American people, no matter how unhappy their circumstances —I refer to hope.

A campaign based on cynicism and mistrust will surely meet some measure of success because the way has been cleared by an army of malcontents. They've filled the bookshelves with volumes calling our society *The Sick Society;* branding the nation as *America, Incorporated;* saying we victimize the public *In The Name of Profit* and

deploring what has been called "Consciousness I and II." The illness and the cure are documented in what has been titled *A Populist Manifesto.*

And, when the Committee for Economic Development issued a booklet urging all business firms to accept a high degree of social responsibility, it was greeted with these words, written by one of the most prominent columnists for one of the country's most prominent newspapers:

> "The mania of maximization of profit seems to turn businessmen into economic Richard Specks, people so demented that they will have that last dollar although, if they were sane, they'd know that to make it they must sacrifice their own physical health and well-being."

With that sort of propaganda flooding us, no wonder a recent survey found that 46 percent of all Americans think big business is "dangerous to our way of life." This is plain nonsense. Would nearly every American family have a car if it weren't for so-called "big business"? Would we have telephones and television and indoor plumbing in most homes? Would we have the levels of education and nutrition and health care that, however imperfect, are the envy of most human beings elsewhere on this planet?

Well, I won't take your time defending "big business." Even when the critics aim their blasts at "big business," the fallout injures all businesses, big and small, and a lot of citizens who aren't even "businessmen."

Is this of any concern to you? You bet it is! Consider, for a moment, the current epidemics of shoplifting and vandalism. Sure, we've always had to contend with larceny and destructive individuals, but has this kind of conduct ever before been condoned by whole groups in our society? Today the so-called "rip-off" has become a sort of art form and

a folk religion.

Are businessmen the only ones who suffer because of shoplifting? You know the answer. We all suffer because of the resulting higher prices. We all pay the high costs of preventing vandalism and repairing its damages.

And let me read you a sad little item that appeared in one of our local newspapers on May 13th:

> "The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't 'rip-off' the customers. In appreciation, the shoplifters went to work on them. 'The kids steal anything they can get their hands on and put in their pockets,' said one proprietor. 'We try to sell things at a low price, but it seems some people just have to steal'."

I don't think I have to add anything to that newspaper story. It speaks for itself. Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nation's leading politicians preaching that business is evil, that it makes excessive profits by gouging and cheating and deceiving the American public. It's something to think about.

Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about "closing the loopholes" that only benefit "the rich and powerful." As *The Wall Street Journal* commented the other day, one of the biggest so-called "loopholes" is the provision enabling homeowners to deduct mortgage interest and property taxes from Federal taxable income.

Well, there are many millions of homeowners in this country and they aren't all "rich and powerful." Most of them are just ordinary citizens. And, as a matter of fact, I always thought there was a

sound public policy behind those deductions—to encourage people to own their own homes. Take the deductions away and I doubt you'd prevent wealthy people from owning homes, but you'd surely make it tough on everybody else.

And, talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well, there are candidates who think they're *way* too low.

And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.

But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had.

In fact, the avowed purpose of all those proposals is to give the government even greater power to redistribute income.

Now, don't get me wrong. The stated objectives are very worthy—to use that power to stamp out poverty; to improve health care; to provide jobs for every American; to eliminate the inequities in our society.

All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possibly provide more employment. It would, in fact, have the opposite effect.

But I won't quibble over specific points. Let me focus on the broadest aspect of this thing, and

that's the really important issue. What I have in mind is nothing less than individual freedom. The kind of collectivized society those people are talking about is the greatest threat on earth to our freedom.

In mid-May William F. Buckley gave a talk in my community. I wasn't able to attend, but the next morning's paper reported this:

> "Mr. Buckley said there is an increasing tendency of Americans to trade in their many freedoms for bits of economic and social security."

How right he is! Now, just by coincidence, another article appeared in the very same edition of the paper. It was a dispatch from the *Times* of London; maybe it appeared in your local papers.

It summarized a report from Sweden, and Sweden, as you probably know, is the most highly socialized country in the western world. The headline of this article was: "Sweden has harsh, ruthless society, report confirms."

The Swedes have free health care and cradle-to-grave security. But what does it cost them?

They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world; and they are suffering what amounts to an epidemic of mental breakdowns.

In the interests of equality, most things in Sweden are standardized. In the words of the report: "It is true that if you have seen one Swedish town, you've seen them all .... Swedish flats and houses are so much alike that you can enter any kitchen in the country and usually know where the rubbish bin is located." How'd you like living under those conditions?

But here's the worst part of it. Listen to this: "Many observers believe that some chilling aspects of the '1984' society appeared in Sweden several years ago." This type of society, writes the Swed-

ish psychiatrist who prepared the report, "leads to a prodigious, human-crushing process."

Is that what the so-called "populist" movement in America really wants—to crush the human spirit? One of the great ironies of it all is that the populist movement is seen as a rebirth of Jeffersonian philosophy. Now, that's a strange thing, because I've checked into what Thomas Jefferson thought this country is all about, and his ideas are remarkably fitting today.

Listen to these words on taxation and government spending, written in 1816:

> "... private fortunes are destroyed by public as well as by private extravagance. And this is the tendency of all human governments.... till the bulk of society is reduced to mere automatons of misery, to have no sensibilities left but for sinning and suffering.... And the fore horse of this frightful team is public debt. Taxation follows that, and in its train wretchedness and oppression."

As sure as I'm standing here, the economic programs now being preached by some political candidates would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future.

This is not to say that continual and gradual changes in our society aren't needed, and needed badly. There's still a lot of inequity in our land; there's a lot of poverty; there's a lot of suffering that must be remedied. But we must find a way to do it that doesn't stop our economy in its tracks—a way that doesn't wipe out the individual liberties that have made us a proud country, with every right to be proud.

That's more than enough moralizing. I'm not a philosopher; I'm a practical man. And that's why

I'd like to give a few practical suggestions. The political campaigns are coming. And, as I've pointed out, we know what a lot of the candidates are going to be saying. I say, let's keep them honest.

Right now, look at their declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups like this one, groups with a deep interest in good government, organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

One thing you can do is talk in advance with the communications media in this area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action.

I've quoted Thomas Jefferson before and I'll quote him just one more time. It seems that Jefferson didn't like long-winded speeches. In 1824, in a letter to the president of a debating society, he said this: "Amplification is the vice of modern oratory. It is an insult to an assembly of reasonable men, disgusting and revolting instead of persuading. Speeches measured by the hour, die with the hour." That's good advice, and I'll follow it. Thank you!

*Public Affairs Department*
*Bethlehem Steel Corporation*
*Bethlehem, PA 18016*

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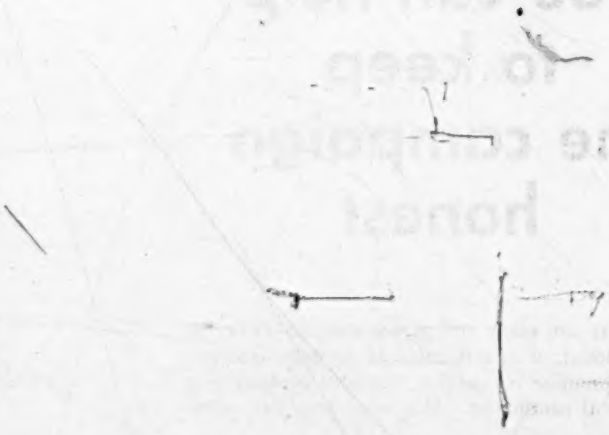
# How you can help to keep the campaign honest

There are many things you can do—either as an individual, or as a member of an organization—to help promote responsible, truthful campaigning by political candidates. We urge your full participation.

**Become informed.** Determine what the major issues are in this year's elections—such as Vietnam, inflation, taxes, unemployment, environment, foreign affairs, busing, and law and order. Read books, magazines, periodicals, and reports to gain background; read newspapers to follow current trends. Make a habit of watching televised news programs, and listening to radio reports. Discuss the issues with your friends, neighbors, and business associates.

In addition, find out what the candidates stand for. What are their proposals and political philosophy? What have their records been on major issues? What are their qualifications for office?

**Prepare.** Forewarn the communications media about possible false statements that could be made by political candidates. Also, advise newspaper publishers, editors, reporters, radio and television people, and magazine publishers of any fallacies in the political programs of candidates. Use



facts and illustrations, and give them the sources of your material.

If you work for a fairly large business organization, see to it that your sales people and legislative representatives are advised to report any false or misleading statements that come to their attention, so that appropriate rebuttal can be made. Encourage your executives to accept speaking engagements and to urge their audiences to keep candidates honest.

**Be inquisitive.** Scrutinize articles and speeches by candidates. When you encounter a statement that seems unlikely, or is inconsistent with your own knowledge, check on it. Your sources, of course, will vary with the subject you are researching, but the following may be useful to you: The Readers Guide to Periodical Literature, and the Public Affairs Information Service at your local library include a listing of current books, magazine and periodical articles, and government documents. Also, use encyclopedias and almanacs; informational services of chambers of commerce, and other local business associations. Keep in touch with the public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies. Or ask the candidate himself to provide the source of his information. If the facts contradict the statement you are researching, document your sources.

**Correct the record.** If you are attending an open meeting at which a political candidate—or anyone else—makes a statement you know to be wrong, stand up and question him, perhaps during the question and answer session. If that is not possible, or if you hear or read such a statement in the news media, write to the candidate, the radio and television stations or newspapers which publicized the incorrect information, and perhaps to local newspapers in areas where the statement was heard

or read. Make your communications positive in tone; cite relevant facts and figures to prove your point.

**Follow up.** To the extent possible, check future statements of the candidate to be sure he has corrected the wrong information he has been using. If he has, write and thank him. If not, some of the following steps might be indicated: write or wire the local, state, or national leader of the candidate's political party, asking that he or she intervene; write or telephone officials of your local news media, suggesting that they prepare an editorial on the situation and that they discuss the issue in their news articles or programs. Communicate again with the candidate, telling him of the steps you have taken and strongly urging him to correct the wrong information he is using.

**Talk with people.** Talk with everyone with whom you come in contact about your efforts to promote responsible campaigning. Discuss the incorrect statements that have been made, and tell your listeners who made them. Encourage them to become active in their own localities.

**Finally, form "Truth Squads."** Involve your friends, neighbors, church groups, business organizations, civic clubs and schools in the effort to promote truthful, honest political campaigning. Divide the research and communication work among members of the Squad and meet periodically to discuss issues and projects, and to share information. Have each participant communicate with the officials suggested above in every instance where an irresponsible or incorrect statement is identified.

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